

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, . Docket No. 14-CR-00094-JFB

vs.

JOSEPH VALERIO,

.
. 100 Federal Plaza
. Central Islip, NY 11722
. March 21, 2014

FILED
CLERK

3/25/2014

U.S. DISTRICT COURT

TRANSCRIPT OF BAIL HEARING EASTERN DISTRICT OF NEW YORK
BEFORE HONORABLE JOSEPH F. BIANCO, **LONG ISLAND OFFICE**
UNITED STATES DISTRICT JUDGE

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Colloquy

3

1 COURT CLERK: Calling case 14-cr-94, US v. Joseph
2 Valerio. Please state your appearance for the record.

3 MR. KABRAWALA: Assistant US Attorney Ameet Kabrawala
4 joined by AUSA Allen Bode. Good afternoon, Your Honor.

5 THE COURT: Good afternoon.

6 MR. LaPINTA: Good afternoon, appearing for Joseph
7 Valerio, Anthony Lapinta and also Leonard Lato.

8 THE COURT: Okay, good afternoon. Defendant is
9 present as well. Obviously, we scheduled this because
10 defendant has a renewed bail application based upon the March
11 20th letter which the Government responded to and I also had
12 reviewed the March 21st reply letter and I just see I'm being
13 handed up, hold on one second.

14 MR. BODE: I handed up, Your Honor, a -- sorry, I'll
15 stand up -- an e-mail which I was going to refer to today in
16 some of my remarks. I've given a copy to defense counsel as
17 well. It's an e-mail that Mr. Valerio sent to the
18 co-conspirator in the Ukraine.

19 THE COURT: Okay. Let me just take a minute just to
20 look at it.

21 MR. BODE: Thank you.

22 THE COURT: I'll let the defense go first since this
23 is their application.

24 MR. LaPINTA: I'm sorry, Your Honor.

25 THE COURT: I said I'm going to let you go first

LaPinta/Argument

4

1 since this is your application, okay?

2 MR. LaPINTA: Thank you. Judge, would you mind if I
3 used the microphone?

4 THE COURT: No, you can use that, just pull the mic
5 up.

6 MR. LaPINTA: Thank you. Yes, sir. May it please
7 the Court and Your Honor, I guess the best way to describe this
8 application is a supplemental bail package. When we were here
9 last and we made the extensive bail package application to the
10 Court, we took particular note to the reasons that you
11 carefully, prudently and properly articulated on the record in
12 denying the application. What I mean by properly, I mean in
13 terms of developing a record.

14 You addressed a number of different issues that you
15 were concerned about insofar as a security guard being present
16 at the home being inadequate to assure one safety and two,
17 safety of the community and also two, his ability to flee. You
18 articulated on the record that a security guard would not be
19 able to monitor him inside the house in the event that he would
20 cut off the ankle bracelet and flee by a back door, a window or
21 other exit areas of the house.

22 To address that concern, and to make in my estimation
23 as fool proof, error proof of a package as possible, we offer
24 the additional conditions. A second security guard to be at
25 the location. And the second security guard could be

LaPinta/Argument

5

1 positioned anywhere that you, the FBI, pretrial services, the
2 US attorney's office would feel appropriate to be including one
3 being outside, one being inside, two being outside, one in the
4 rear of the house, one in the front of the house. One being
5 inside the house, one roving the outside of the house or even
6 supplementing and moving about in whatever areas of that
7 premises they feel is appropriate to provide the safest type of
8 secured environment possible.

9 The way that this house is structured, a layout of
10 the house lends itself to very, very thorough, comprehensive
11 surveillance of the occupants of the house. The entrance of
12 the house could be monitored very easily. The exits of the
13 house could be monitored very easily. The bedroom of the house
14 where my client will be sleeping is actually in a location of
15 the house where there is only one way to enter and exit. The
16 window is the type of window that cannot open to the degree
17 where someone, a human being could fit outside the window.

18 That is because it isn't typically a bedroom. It's a
19 living room that has been made into a bedroom and there's a bay
20 window there that allows the windows to open in a way that
21 allows for perhaps an 8 to 10 inch gap of opening. Over and
22 above two licensed professional security guards, this house as
23 you're aware has a recently installed camera system that is
24 surveillancing (sic) the perimeter of the outside perimeter of
25 the house that has a direct feed to the Government. I'm not

LaPinta/Argument

6

1 going to go into every particular detail. I'm sure you know of
2 them very well.

3 In addition to that security camera device, there's
4 also a security system device that the house has and has had
5 for years. It's a device that is wired to all entrances, exits
6 and windows of the house. It's an alarm system. If a door is
7 opened, if a window is opened, that alarm goes off. There's
8 one key pad that controls that alarm system. That key pad is
9 programmable. We have no problem at all having that program
10 set to a confidential password to engage and disengage the
11 system.

12 I can't think of any other conditions that could
13 satisfy what the Court articulated in denying this bail
14 application. There are a number of cases that were cited by
15 the Government, all of them as you read from our submission
16 this morning in response to that, are all easily
17 distinguishable cases insofar as they involve organized crime
18 cases with active leaders of crime families.

19 This is not a conspiracy case of somebody who is, you
20 know, here accessible without having computer or phone access.
21 Mr. Valerio is in a situation where he would be in the solitude
22 sanctuary of his home, in a secure safe environment not only
23 for himself but also for the general public in terms of the
24 danger issue that you must consider here in this application.
25 If you want us to further our discussion of the applicable law

Lato/Argument

7

1 and how these cases are distinguishable, I'm happy to address
2 that. I would ask Mr. Lato to answer those questions since he
3 authored that submission to the Court.

4 THE COURT: Yes, I guess, I just wanted to talk about
5 those cases briefly so if Mr. Lato wants to address that.

6 MR. LaPINTA: Sure.

7 THE COURT: Essentially, I think, and I know
8 obviously you disagree with what I think the level of
9 dangerousness and flight is but essentially you're trying to
10 replicate a jail in his home and there's a back and forth in
11 the case law which you cite about whether or not some courts
12 have expressed, Judge Rakoff has stated that if someone has the
13 wealth to replicate a jail, that's what the Bail Reform Act
14 allows. Other courts have disagreed with that and the
15 Government cites a Second Circuit case where they don't address
16 that issue but they say they're troubled, I think was the word
17 in the summary order, they were troubled by that prospect.

18 But in this case, to the extent that you're trying to
19 create that jail, there's two things that I think can't be
20 overlooked. The first is that the jail is at the mercy of this
21 firm that's hired as well as the additional government
22 resources that would be necessary to monitor that security firm
23 to make sure that they're doing a good job even though the
24 defendant is paying for them. And all the other conditions
25 that you are proposing that would require the Government to

1 conduct an unannounced search to check the surveillance system,
2 to monitor whatever other things that you're proposing that
3 they monitor. That requires the Government to essentially make
4 sure that this private jail is running at the way it should be.
5 And I don't see anything in the bail reform or case law that
6 suggests that that should be what the Government needs to do.
7 I want you to address that aspect of replicating a jail as
8 opposed to the issue of wealth or not wealth because this is to
9 me a separate issue.

10 MR. LATO: There's always going to be some Government
11 expense in anything that we do, even in this courtroom today.
12 If a person is in the MDC, there's a government expense there.
13 If a person is under house arrest, you have pretrial services
14 making visits unannounced. We've had cases where the Judges
15 have allowed defendants out on bail where the FBI or the DEA
16 will also have the option of making an unannounced visit to the
17 house. I had a case before Judge Seybert, it was a motorcycle
18 gang where one of the deciding factors in Judge Seybert
19 releasing, you know, my client was that we consented to random
20 searches not only by pretrial but by the ATF in that case.

21 Granted the ATF is not going to spend money going all
22 around but as I said, there's an expense in everything. Now,
23 it's going to be a minimal expense and with respect to the
24 security firm, if of course the security firm based upon the
25 Government's investigation or the FBI's, when I say that, the

1 US attorney's office and the FBI is unacceptable, then that's
2 it. We have to come up with a different firm. They would be
3 right. But, but for that, there's no reason why this firm
4 would be presumptively no good to insure this.

5 THE COURT: But when you say no good, the problem
6 with any private firm is that you're at the mercy not just of
7 the reputation of the firm generally, the Government may have
8 either favorable view or no view of the reputation of that
9 firm, but you're at the mercy of each individual person who is
10 sitting in the house on any particular day. So you know every
11 single person who works with that firm, would be part of
12 replicating the jail is a potential weakness in the whole
13 proposal. That's the whole problem with private jails.

14 We have jails, we don't have those issues and
15 obviously you could have people who work for the Bureau of
16 Prisons who might be problematic but there's a much more
17 elaborate system to guard against all the things that the Court
18 would be concerned about with someone in their home and you're
19 at the mercy of every aspect of that firm, not just its general
20 reputation of whether or not there's an FBI agent, former FBI
21 agent who runs the firm or who works at the firm. I don't know
22 anything about this firm but.

23 MR. LATO: But to address at least some of the
24 concerns of the Court is that the members of this Epic
25 Security, all right are retired law enforcement, some are NYPD.

Lato/Argument

10

1 Some are others. It's not as if these are people who needed a
2 job and they became security officers.

3 THE COURT: You're proposing that they would be armed
4 or not armed?

5 MR. LATO: No, armed would be only if the Government
6 says it's okay. We can have armed guards, but as I said in my
7 first letter, I don't know if Special Agent Troy and his
8 colleagues would want to have armed guards at the residence.
9 That's strictly up to the Government and the Court. We have
10 the option. We will pay for armed guards. It's at the
11 discretion of the Court and the Government because that's
12 obviously a double edged sword is perhaps the wrong metaphor to
13 use here but does the FBI want anyone other than themselves
14 having guns? But we can do that.

15 The thing is this. There was one case I cited in my
16 opening brief that nothing will guarantee the safety of the
17 community or guarantee against the risk of flight. But if the
18 adverb reasonably means anything, coupled with assure, will
19 this reasonably assure the safety of the community and other
20 persons and the defendant's appearance as required? The
21 reality is this. I could probably do a better job than most
22 anyone in escaping, but even I could not escape from this
23 place, all right.

24 The reality is this. Where could Mr. Valerio go even
25 if he managed to climb out a window, down a set of towels? He

1 will be found in moments. He's not a member of La Cosa Nostra
2 where it's the Genevieves or the Gambinos where simply by
3 having a conversation he can order a hit in an ongoing war.
4 The reality is this. He poses a danger to no one if he's in
5 that house. There are no electronic devices. He can't
6 reasonably get out of there. Obviously, we have to consider
7 the fact that he was out for a week before the second complaint
8 was brought.

9 In that week, nothing went wrong. So that is at
10 least a consideration. Of course it's not dispositive but it's
11 a factor. And the point is this. This is about as
12 comprehensive a package as even the most creative defense
13 lawyers can come up with and I think I'm going to say something
14 today that has been unspoken but I think it's appropriate.
15 There's something about this case that I think gives people
16 unease. If this were a drug case, or a typical violent crime
17 case, we have the same statutory presumptions of danger to the
18 community and risk of flight. There is nothing in the Bail
19 Reform Act that makes it different for manufacture or child
20 pornography.

21 However, it makes everyone uneasy. But unlike a lot
22 of the violent crime cases and the drug cases, there's no
23 conspiracy here and it's just speculation to believe that if
24 Mr. Valerio were to get out, he would somehow go on a child
25 porn manufacturing spree or run to who knows where. There's

Bode/Argument

12

1 just something about the crime itself that makes people feel
2 uneasy they were not accustomed to and I think that's a big
3 factor why the Government and the Court as of course I am aware
4 of the Bail Reform Act is reluctant to release him.

5 But this is a huge package, several million dollars,
6 house arrest, private security. This is the most I think
7 anyone can reasonably come up with and I know the Court stated
8 the last time you're not saying as a blanket rule no one can
9 get out in child manufacturing cases. But we're coming pretty
10 close to that given the size of the package because even if we
11 had \$10 million or 30 million instead of three we would still
12 be in the same place. If we had 15 guards, we would still be
13 in the same place.

14 Helicopters, the same thing. Because it's all
15 private. The reality is this. Presumably, unless there's
16 something wrong with Epic Security, these people will do their
17 job. Agent Troy and his colleagues do not have to drive by the
18 house. They'll have a good feeling very soon within a day or
19 two whether this is trustworthy and given the relationship, I
20 think that we have with the Government here, if there's even
21 something that makes the Government uneasy, even if it's not a
22 violation, we will address it right away.

23 The slightest thing that Special Agent Troy or
24 Special Agent Macinio (phonetic) or any other agent or Mr. Bode
25 or his colleague, I'm sorry, we've never met, says we don't

1 like this, we'll correct it. The slightest thing we'll correct
2 it. They don't like what the mother is wearing, we'll change
3 her outfit. That's the best that we can do. If there are any
4 other cases, Your Honor, that you want me to go through?

5 THE COURT: No, that's okay.

6 MR. LATO: But as you see in my letter, I don't think
7 any of the cases that the Government cites has any relevance.

8 MR. BODE: Thank you, Your Honor. Simply by having a
9 conversation online, Mr. Valerio can and has demonstrated in
10 the past that he can have a child molested in horrible,
11 horrible ways. I handed up just a sample of an e-mail from
12 July 17th, 2012. It demonstrates both the strengths of the
13 Government's case and the ease by which Mr. Valerio could with
14 an electronic device cause an immeasurable harm, I submit a
15 harm much greater than any drug case, although Mr. Lato does
16 not recognize those dangers obviously.

17 In the e-mail, you can see he's talking about the
18 video sent by cell phone camera that he needs, you've done a
19 terrific job with the cell phone camera. I have a new cell
20 phone that allows me to transfer your video to my e-mail. The
21 screen is bigger to view. Plus you can have endless video time
22 per session with the cell phone. He talks about specific acts,
23 very specific acts that he wants to have done with the three
24 year old. He talks about how he wants her to be dressed in
25 pantyhose which I would note is also, there are also photos of

1 the six year old victim that he dressed up in a similar manner.

2 On page 2, he discussed very graphic sex acts that he
3 wants conducted on this child. Towards the end of the e-mail
4 in all caps, he tells her get those videos done. He talks
5 about how he wants her to, in addition to children, he wants
6 this woman to create videos in locker rooms, et cetera and he
7 says just turn your cell phone camera on. Point it at your
8 subject. Woman, teen or little girl. Aim it as you pretend to
9 be speaking on your cell phone. As you keep it filming with
10 the phone to the ear.

11 Very specific directions and I would note it shows
12 how easy it is for him to commit this crime. The defense here,
13 Your Honor, is in essence trying to create a private jail. But
14 even aside from the issues of whether a private jail would be
15 allowable, which the Second Circuit is troubled by in the Banki
16 case, they did a bad job, they're doing a bad job of it here in
17 not accounting for the online danger. They can't account for
18 that online danger, I submit.

19 The online danger here can be established with you
20 know, a device as small as you know, two inches by three inches
21 which you could secrete anywhere in that house. People coming
22 into that house could bring them in. The defendant's mother
23 parks in an attached garage in that house. They could come in
24 via her car. There's a myriad of ways that a cell phone or an
25 electronic device could make its way into that house. Based

1 upon the years that I've been here in the Eastern District,
2 they find cell phones at times in jails. If a cell phone can
3 make its way into a jail facility and that has happened in the
4 past, how much easier is it that this device can make its way
5 into the home? Especially where as the defense indicated at
6 the first arraignment on the superseding indictment before
7 Judge Brown, the defense conceded that the defendant's mother
8 had mental difficulty since having some medical issues arise.

9 I would note as well there's no, the resources here,
10 the defense is speaking with, in terms of a private security,
11 even if the Government were to authorize and we cannot
12 authorize, a private security to carry guns, we can't authorize
13 them to shoot Mr. Valerio if he flees. These are issues that
14 are dealt with in the jail, properly dealt with at the jail
15 environment that can't be replicated in a private jail no
16 matter the resources.

17 And frankly with jail facilities, the guards are
18 trained for what they're doing. Private security guards are
19 not federal agents. They haven't gone through the same
20 training that federal agents have gone through specifically
21 agents involved in securing prisoners. So it's the online
22 danger here which is dramatic. But in terms of the danger of
23 flight as well. If they can't shoot him, they can't tackle him
24 in leaving. There's still nothing to stop him from snipping
25 off a monitor and going. We'll know that he goes. We'll get

1 maybe, maybe get a little more notice.

2 But in terms of the house, are they going to
3 accompany him into the bathroom? Are they going to sit there
4 in the bathroom with him when he's in the bathroom? When he's
5 sleeping, are they going to be in the room with him? You know,
6 a jail environment is a very secure environment compared to the
7 home environment. In terms of Mr. Valerio, one thing, just in
8 terms of a new piece of information that I happen to have
9 another proceeding today with the pretrial officer that
10 supervised Mr. Valerio during the brief time that he was out.
11 And she indicated that he was very difficult to supervise in
12 that she indicated she had never seen someone as controlling as
13 he was with the girlfriend that was in the office with her.

14 When Mr. Valerio was in the waiting room at pretrial
15 services with his mother, at one point he was screaming at his
16 mother so loudly, that the pretrial officer had to come from
17 the back where they are, all the way to the front lobby of the
18 pretrial services because he was screaming at his mother
19 regarding something to do with paying of attorneys. I submit
20 Mr. Valerio's history shows his rage.

21 Mr. Lato indicated there was nothing, he was out for
22 about a week, I would note as we noted previously, he was out
23 for about a week and his immediate impulse was to lie to the
24 psychologist who was treating him. He lied about the crime
25 that he, the very crime that he was charged with.

1 In terms of, just a couple other matters that were
2 raised by the defense which I note and then I just want to say
3 a couple words about some of the cases. It's not a matter of
4 unease about the crime, Your Honor. This is a very serious
5 crime. It's one of the most serious crimes in the federal
6 statute. And the measure of harm here should Mr. Valerio
7 access an Internet device is incalculable. The abuse of the
8 three year old which he directed and is described in the e-mail
9 was horrific abuse committed on a toddler.

10 So it's not an unease. It's the measure of the harm
11 that can be incurred and the ease with which he can commit that
12 harm. I would also note the defense keeps mentioning the 3
13 million figure and as we mentioned before, it's at best 2.2
14 million. There's now a forfeiture count as to the defendant's
15 residence which was one of the items which was going into that
16 figure.

17 In terms of the cases, the Sabhnani case which the
18 defense cites is very easily distinguished. As the defense
19 concedes, it's a presumption, this is a presumption case.
20 Sabhnani was not. In Sabhnani, the Government proposed the
21 very conditions which the defense then accepted. And Sabhnani
22 also doesn't account for the online danger. Sabhnani was a
23 case where you couldn't commit the crime without hiding a
24 person. It's not a crime that was able to be committed with a
25 small electronic device easily secreted.

1 I would note in Banki, the Second Circuit directly
2 dealt with Sabhnani. They actually, from Banki, they indicated
3 -- a moment here -- Mr. Banki contends that our decision in
4 Sabhnani, S A B H N A N I, entails a legal obligation on
5 District Courts to evaluate whether such privately financed
6 home confinement would suffice to secure a defendant's
7 attendance. Sabhnani does not impose such a requirement.

8 And then they limit Sabhnani. They indicate in that
9 case rather we concluded that the Government's argument that no
10 conditions release could prevent defendant's flight was
11 "undermined" by its own submission which argued only that the
12 defendant's proposal contained certain loopholes which the
13 defendants promptly agreed to close by accepting the
14 Government's proposed amendments to its plan. And I would also
15 note in addition to Banki, the case of Shelikhov,
16 S H E L I K H O V which is 468 F. Appx. 54 which is an
17 unpublished case from March 19th, of 2012 which again the
18 Circuit noted that Sabhnani, the Government's argument was
19 drastically undermined because they had proposed the very
20 items, loopholes which the defense then closed.

21 There is no way to properly account for the online
22 danger which can be committed with a device as small as a cell
23 phone and frankly was committed that way in the past by Mr.
24 Valerio. Jail environment where everything is regulated, food,
25 bathroom, visitors can sufficiently account for that danger.

1 Could I have just one moment, Your Honor? That's it, Your
2 Honor, thank you.

3 MR. LATO: In reply to Mr. Bode's argument, I have
4 the following to say. With respect to Banki, B A N K I, that
5 case has no applicability here because there we're talking
6 about somebody doing business with the blacklisted country of
7 Iran violating an order of the President of the United States
8 under the International Emergency Economic Powers Act. So what
9 we're really talking about in that case, and I don't need to go
10 through the whole history of the US foreign policy with Iran,
11 no one is getting out in that case and this case isn't even
12 remotely comparable to that.

13 In fact, Mr. Irina (phonetic) himself had a better
14 shot of getting out than Mr. Banki. Now, with respect to Mr.
15 Bode saying if Mr. Valerio runs, it's not like the private
16 security firm can shoot him. Well, based upon my understanding
17 of New York and federal law, neither can Special Agent Troy
18 under those circumstances. There would probably be some
19 question of why they're shooting an unarmed man in the back.
20 But let's not engage in speculation here.

21 Now, in terms of Mr. Valerio supposedly lying to a
22 psychologist, well, if he did that, that's a bad thing.
23 However, it's not like he said, even according to the
24 Government, I was arrested for stealing a letter from the mail.
25 Some people are understandably reluctant to talk about what

1 they have done in terms of the severity. Now, having said
2 that, he didn't run. He didn't engage in acts of violence
3 against children or anyone else. So although what he did to
4 the psychologist if it occurred or yelling at his mother, may
5 be behavior that one wouldn't approve of, it's not a violation
6 of the conditions of his release.

7 Now, Mr. Bode is saying that I don't understand the
8 difference here with respect to this case and say a drug case
9 and the ease with which Mr. Valerio could access an electronic
10 device and I thank Mr. Bode for explaining what I don't
11 understand but the reality is this. It's one thing if a person
12 wants to get a cell phone or have a conversation to help
13 himself say kill someone to make his case better, although
14 under the Federal rules that wouldn't help him if he wants to
15 escape.

16 As the Court said in Madoff, to the extent that
17 anything occurred in the past, such as the crime that Mr.
18 Valerio or crimes he may have committed is relevant to bail
19 only looking forward. So whatever e-mails Mr. Valerio sent if
20 they have no bearing on what he is likely to do, they are
21 irrelevant. So I still have yet to hear anything other than
22 speculation why would Mr. Valerio based upon his history of all
23 things want to get his hands on a cell phone to send a text
24 message to some unknown person to manufacture child porn?
25 There's no evidence at all and it's only speculation to suggest

1 that's likely to occur.

2 He can't get out of the house, when I say can't, I
3 mean reasonably. There is no basis to believe reasonably he
4 could do any of this. One final thing, with respect to the
5 bail package. Mr. Bode states that the \$3 million package is
6 really only \$2.2 million. He's wrong and here's why. The
7 house that Mr. Valerio has put up, his own house that's worth
8 about \$800,000, true, Mr. Valerio may lose that house. But he
9 has only \$200,000 in equity. And I say that because when we
10 proposed the \$3.2 million package, we took into account the
11 fact that he had only \$200,000 in equity.

12 So the package is still in the \$3 million range, not
13 2.2 million. Hold on one second, please. That's it, thank
14 you.

15 THE COURT: Okay, thank you. The Court has obviously
16 reviewed the additional bail proposal and letters related to
17 that as well as the argument of counsel and again, I looked at
18 the issue again de novo and I again find, I'm not going to
19 repeat all of the reasons that I gave previously, and I think
20 I'm going to issue a written decision on this in any event but
21 I again find that the Government independent of the presumption
22 has met by clear and convincing evidence its burden of
23 demonstrating that the defendant is a danger to community such
24 that no conditions or a combination of conditions can
25 reasonably assure the safety of the community as well as by a

1 preponderance of the evidence that no combination of conditions
2 can assure his appearance in court.

3 And again, I rely on everything that I said
4 previously. I'm just going to summarize a couple of things and
5 address the specific issues with respect to this proposal and
6 why I believe that these conditions or any combination of
7 conditions cannot beat the issues of danger and flight in this
8 case. I just emphasize again we have the most serious type of
9 crime here in which the defendant is charged with aiding and
10 abetting the sexual exploitation of a child and as Mr. Bode
11 noted, it's not just the extreme danger presented by those
12 charges.

13 And again, based upon what I said at the earlier
14 hearing that on the weight of the evidence factor that it is an
15 extremely strong case based upon the Government's proffer of
16 its evidence but it is not just the danger that's raised by
17 that crime but in combination with how that crime was alleged
18 to have taken place here which was the use of Internet devices,
19 was the crimes charged here relate to Mr. Valerio's home
20 including the second series of charging that were the subject
21 of the superseding indictment so you have extremely dangerous
22 conduct charge involving sexual abuse of a child through the
23 use of what can be extremely small Internet devices occurring
24 at least in part in the home.

25 And given, I'm speaking now to the issue of danger,

1 given those, and I should add a proffer of the Government that
2 within that home that there were cameras secreted within walls
3 of the home, under those circumstances for the reasons I
4 outlined previously, it's my conclusion that the only
5 conditions that could reasonably assure the safety of the
6 community in this particular case not in every case where
7 someone is charged with child, possession of child pornography
8 or some other similar crime because there are defendants who
9 are before me who are on bail on home detention in some of
10 those cases.

11 But in this particular case, given these allegations
12 and charges and the evidence the Government has proffered, it
13 is my view the only conditions that could reasonably assure the
14 safety of the community would be replicating a jail. And the
15 defense has done their best to try to replicate a jail in Mr.
16 Valerio's home.

17 I put aside the issue of whether or not assuming you
18 could replicate a jail that a defendant should be able to
19 replicate a private jail in his own, I don't need to decide
20 that issue. The Second Circuit has decided that issue,
21 although I agree with the summary order that suggests that
22 that's troubling and I believe that to the extent that Mr. Lato
23 and some other courts have addressed that particular issue and
24 say the Bail Reform Act refers to if you can find conditions of
25 release that are sufficient that that should, that it's not

1 punitive and that's true.

2 But what we're talking about here are not really
3 conditions of release. What we're talking about here are
4 really conditions of confinement by replicating a jail, these
5 aren't conditions of release where essentially trying to limit
6 the defendant's freedoms almost exactly in the same way they
7 would be as if he were in jail. So what we are really talking
8 about here are simply conditions of confinement and I don't see
9 that the Bail Reform Act was seeking to address how once it's
10 determined that someone needs to be essentially in jail,
11 because of the danger or flight issue that then you should try
12 to create conditions of replicating that jail in a private
13 setting. I just don't see that intended in the Bail Reform
14 Act. I don't believe there's any constitutional right to
15 replicate a jail cell in your home.

16 But in any event, I need not decide that issue and I
17 think there's a reason that no court, at least Circuit Court
18 has had to decide that issue is because for all the reasons Mr.
19 Bode noted and some of the reasons I think I've indicated to my
20 questions when defendants including in this case try to
21 replicate that jail, it is an imperfect jail in almost every
22 situation including this one for two fundamental reasons.

23 First, the Government is at the, there are several
24 aspects to this package including the security firm, including
25 the monitoring of people in and out, that as for the reasons

1 Mr. Bode cited and I agree are highly imperfect when compared
2 to a jail. The Government is at the mercy of the hiring, the
3 training of the security people who are utilized throughout the
4 period of monitoring. You have issues about armed or unarmed
5 which again you don't have those issues in jail.

6 There are obviously problems with both having them
7 armed and having them unarmed but that's why jail is a more
8 perfect forum for addressing this type of danger. And you have
9 training issues, legal authorization issues for all those
10 reasons, the Government and to the extent the Court would be
11 relying on a security firm or at the mercy of the firm itself,
12 which is not the equivalent of the system of security in a jail.
13 both in terms of the guards and the other safeguards in a jail.

14 Secondly, the Court is at the mercy of all the people
15 that go in and out of there, even if they're approved people.
16 Again, because it's not a jail. And even the jail is not
17 perfect, but it's much more perfect at regulating whose
18 bringing what into the jail versus a home especially when you
19 have relatives or other individuals who are coming in to visit
20 the defendant.

21 So I believe that to extent that the defendant has
22 tried to replicate a jail in his home in this case, it is
23 highly imperfect and does not address the issues of danger
24 created if a defendant has access to any type of Internet
25 device, in my view in this case, that poses a danger to the

1 community that should, the community should not have to face
2 and this is an imperfect attempt to right or make sure that
3 that does not happen. Secondly, to the extent you could try to
4 replicate a jail with these conditions, it does have costs to
5 the Government.

6 Although he's paying for the security firm to the
7 extent that the Government again has to check into the security
8 firm, monitor the security firm or enforce other of these
9 provisions of release including viewing the surveillance system
10 that exists, conducting unauthorized searches of the house or
11 unannounced visits, all of those different things would require
12 diversion of Government resources and Government law
13 enforcement personnel from other activities and other cases and
14 there's nothing in the Bail Reform Act that suggests that if
15 the defendant wants to try to replicate a jail in his home,
16 that the Government should have to utilize law enforcement
17 agents to constantly verify that that private jail is running
18 in the way that it should be and for that reason, second reason
19 I believe that this is also an imperfect replication of a jail
20 that is not required under the Bail Reform Act.

21 So for those reasons, I continue to find that the
22 Government has met its burden by clear and convincing evidence
23 as to danger that these conditions as well as any other
24 combination of conditions would not reasonably assure the
25 safety of the community. I also again believe that flight by a

1 preponderance of the evidence, the Government has demonstrated
2 that no conditions can reasonably assure his appearance in
3 court. Again, I won't reiterate everything I said previously.

4 The defendant is looking at a substantial mandatory
5 minimum in the case with the guidelines that are much higher
6 than the mandatory minimum, in a case where the Government has
7 proffered extremely strong if not overwhelming evidence with
8 respect to the charges in the superseding indictment and that
9 creates an enormous risk of flight that I don't believe is
10 addressed by bracelet or trying to have armed guards follow
11 him, unarmed guards or armed guards try to follow him around
12 the house this package, although it certainly is substantial,
13 there's no indication what moral suasion the defendant's mother
14 or other family members have over the defendant at this point
15 given the situation that he is facing in terms of jail time and
16 the strength of the Government's case.

17 And I certainly am not reasonably assured in my mind
18 that he would not make some effort to try to avoid having to
19 face trial in this case and the potential penalties that are
20 confronting him in this situation. So for all those reasons,
21 I'm detaining the defendant pending trial. Are there any other
22 issues we have to discuss today?

23 MR. KABRAWALA: Your Honor, the Government has
24 exchanged or served discovery. I learned that it was not
25 received so defense counsel and I are going to go back down to

1 my office and we'll turn over some of the discovery that we had
2 actually posted on Monday. There may be --

3 COURT CLERK: If you could just bring your mic a
4 little closer? I'm sorry.

5 MR. KABRAWALA: I'm sorry. There may be discussions
6 with respect to the position of the case and you know, we'll
7 hear from the defense about that. That's it for the moment,
8 Your Honor.

9 THE COURT: I just, I did want to raise one, I don't
10 know, do you have an issue you want to raise or no?

11 MR. LaPINTA: No, sir.

12 THE COURT: Just with respect to the trial date.

13 MR. LaPINTA: Yes.

14 THE COURT: Which I think is May 12th. Right now we
15 have scheduled another trial on that date with Mr. Barkat
16 (phonetic) and his client who's incarcerated which is supposed
17 to be I think three to four weeks. So if your client does not
18 want to waive the speedy trial time, we may need to move that
19 date a little earlier. So I wanted to give you a heads up on
20 that, that there's a problem. I don't know if you have given
21 that some thought or what your intention is with respect to the
22 May 12th date.

23 MR. LaPINTA: Well, I might as well address the
24 Court. I wasn't going to because it may not be an issue but I
25 will in light of what you just told me. We may appeal your

1 denial of bail. I'm sure that's not a surprise to you.

2 However, we're not certain at this juncture if we're going to
3 do that. Obviously --

4 THE COURT: Okay. I do want to let you know I am
5 going to issue a written opinion.

6 MR. LaPINTA: Okay.

7 THE COURT: You can obviously appeal and if you want
8 me to issue a short order today, just denying the bail so that
9 you can start the appellate process, I'm willing to do that. I
10 think the written opinion will be out in the next week but I'm
11 willing to, because you need an order to appeal off of.

12 MR. LaPINTA: Why don't we do that, yes?

13 THE COURT: Okay. I'll just written opinion to
14 follow.

15 MR. LaPINTA: We're going to need the transcripts as
16 well and that's going to take a little time.

17 THE COURT: Okay.

18 MR. LaPINTA: So obviously if we do decide to do
19 that, and we will decide that in short order, that's going to
20 stop the speedy trial clock in and of itself. So I don't know
21 if that is going to mean anything to the Court insofar as
22 scheduling this trial. Let's assume --

23 THE COURT: I would just ask Mr. Bode that. I'm not
24 aware of cases that say that the speedy trial clock is stopped
25 by a bail appeal.

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1 MR. BODE: We looked into this, Your Honor. Mr.
2 Kabrawala is up on this. I'm going to allow him to address
3 that if that's okay.

4 THE COURT: Okay.

5 MR. KABRAWALA: A speedy trial clock is excluded for
6 any delays resulting from "any interlocutory appeal". That's
7 18 United States Code 3161(h)(1)(c). There's a number of cases
8 on point. The leading case actually happens to be out of the
9 Eleventh Circuit. It's United States versus Davenport, 935 F.
10 2d 1223. That's an Eleventh Circuit 1991 case. But there are
11 a number of cases throughout the country, including within the
12 Second Circuit --

13 THE COURT: Okay, that's helpful.

14 MR. KABRAWALA: -- follow that same point.

15 THE COURT: That's helpful, okay. So go ahead.

16 MR. LaPINTA: So let's just assume arguendo that we
17 will file this notice of appeal, obviously it's going to take
18 some time to perfect it, to argue it, for it to be decided. I
19 would think and expect maybe erroneously that that will push
20 back the trial date. Is that something that the Court would
21 consider in moving that date or are you interested in still
22 moving it sooner than later even given the appeal issue?

23 THE COURT: Your client is in jail. The appeal
24 issue, if you want to appeal that's fine but the sooner you
25 appeal it and it got filed in two weeks, and they came back

1 with you know, a ruling, I don't see, even though the time is
2 excluded, my goal is to get your client to trial as soon as
3 possible.

4 MR. LaPINTA: I understand.

5 THE COURT: And so I would still want to try to,
6 regardless of whether you appeal or the result of the appeal
7 is, obviously, I guess if they grant the appeal and say that he
8 should be released, and you may want more time to prepare.

9 MR. LaPINTA: Right.

10 THE COURT: But assuming that they don't do that, my
11 goal would be to try the case within, as quickly as possible.

12 MR. LaPINTA: Okay.

13 THE COURT: In the same timeframe even if we don't
14 have to. So I'm just letting you know that if in fact he does
15 not want to waive the time, I think he should assume for at
16 least those purposes, that he's going to continue to be in
17 jail, then you should start thinking about trying to be ready,
18 how long is the trial, Mr. Bode?

19 MR. BODE: I would estimate Your Honor, four or five
20 trial days at most.

21 THE COURT: So maybe the week before, May 5th.

22 MR. BODE: While Mr. LaPinta is on the spot, to put
23 him on the spot just slightly more, Your Honor, I don't know if
24 the defense is planning on trying to suppress the defendant's
25 statements. If so, we should probably, you know, set a date

1 for them to get those motions in so that we keep, you know,
2 that may also as soon as either a motion is filed or a bail
3 appeal if it materializes is filed, the Government is going to
4 ask at that point that we have a status conference and then we
5 can talk about the date and figure out exactly when it is. But
6 I would like to, if possible if the defense can do that decide
7 as to the suppression issue, sooner rather than later, given
8 the defendant is not waiving time.

9 THE COURT: Well, do you want to have another
10 conference or you want to set a date to put in the letter? I
11 don't want to set a briefing schedule unless you want to on a
12 motion to suppress at this point.

13 MR. LaPINTA: If you don't mind, this is how I like
14 to approach it. Let us decide what our next step is, okay?

15 THE COURT: Okay.

16 MR. LaPINTA: If for whatever reason the Circuit
17 Court of Appeals grants our application, that may change our
18 disposition in terms of waiving or not waiving any further.

19 THE COURT: I know, but as you said, you're not going
20 to know for several weeks probably whether they're going to
21 grant the application or not. I don't want to just waste that
22 time.

23 MR. LaPINTA: I understand.

24 THE COURT: I want to be preparing either to have it
25 on May 5th, having a suppression motion. If you really want to

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1 go forward, I don't think we can sort of wait until they decide
2 it.

3 MR. LaPINTA: Okay. I understand. With that said,
4 let's pick a status date if you're available within 10 days, in
5 10 days.

6 THE COURT: Okay. April 2nd, Wednesday at 1:15.

7 MR. KABRAWALA: That works for us.

8 MR. LaPINTA: Yes. Thank you.

9 THE COURT: Okay.

10 MR. LaPINTA: Thank you, Your Honor.

11 THE COURT: Okay. So we'll issue a short order
12 either today or Monday morning and then the written opinion
13 will follow, okay?

14 MR. LaPINTA: Yes, sir.

15 MR. KABRAWALA: If I could ask Your Honor, just
16 because somebody it might be at issue. I would ask that Your
17 Honor exclude from yesterday to today when the motion was
18 pending. The defendant had a bail motion pending before Your
19 Honor as of yesterday when they filed. I would ask that that
20 day be excluded.

21 THE COURT: Well, that's automatically excluded. I
22 don't have to make a finding but I agree with you that once you
23 file a motion it is excluded so that they would be excluded.

24 MR. KABRAWALA: Thank you, Your Honor.

25 THE COURT: I don't know, you can disagree with that

1 but.

2 MR. LaPINTA: It doesn't really matter.

3 THE COURT: Okay.

4 MR. KABRAWALA: It might matter someday. One day can
5 make a difference.

6 THE COURT: All right.

7 MR. LaPINTA: I don't anticipate it will. Thank you.

8 THE COURT: Thank you.

9 * * * * *

10 **C E R T I F I C A T I O N**

11 I, Tracy Gribben, court approved transcriber, certify
12 that the foregoing is a correct transcript from the official
13 digital audio recording of the proceedings in the
14 above-entitled matter.

15

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17 /S/TRACY GRIBBEN

18 TRACY GRIBBEN TRANSCRIPTION, LLC SERVICE DATE:

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